Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1996

LINDA DARLENE McKENNEY, BILL STANDRIDGE, THEODORE NELSON AND PHILLIP MILLER,

*Petitioners,*

v.

JOHN MARK WILLIAMS BY PHYLLIS A. WILLIAMS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Where, for the purposes of summary judgment, the Defendants do not contest the Plaintiff's version of the facts alleging Eighth Amendment violations, and the district court generally finds a "question of fact"; does *Johnson v. Jones*, 511 U.S. ___, 115 S.Ct. 2151 (1995) preclude the Court of Appeals from jurisdiction to entertain an interlocutory appeal from the denial of summary judgment based upon qualified immunity in light of *Behrens v. Pelletier*, 516 U.S. ___, 116 S.Ct. 834 (1996)?

2. Is the state of mind of a defendant, when no evidence has been presented by Plaintiff regarding culpability, in a 42 U.S.C. § 1983 case alleging Eighth Amendment cruel and unusual punishment a legal question for purposes of determining qualified immunity?

3. Does the sole fact of the death of an inmate establish a culpable state of mind as required by *Wilson v. Seiter*, 501 U.S. 294 (1991), *Farmer v. Brennan*, 511 U.S. 825 (1994) and *Board of The County Commissioners of Bryan County, Oklahoma v. Brown*, ___ U.S. ___, 117 S.Ct. 1382 (1997) thereby preventing the granting of summary judgment based on qualified immunity?

4. Is it possible for a public official to be "immune from suit" when the Plaintiff alleges an Eighth Amendment violation of deliberate indifference to serious medical needs?

## LIST OF PARTIES

The parties to this proceeding on Petition for Writ of Certiorari are:

Petitioners:

Linda Darlene McKenney, Bill Standridge, Theodore Nelson and Phillip Miller

Defendants in the District Court and Appellants in the United States Court of Appeals for the Tenth Circuit

Respondent:

John Mark Williams, deceased, by and through Phyllis A. Williams

Plaintiff in the District Court and Appellee in the United States Court of Appeals for the Tenth Circuit

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Linda Darlene McKenney, Bill Standridge, Theodore Nelson and Phillip Miller respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINION BELOW

The Order of the United States Court of Appeals for the Tenth Circuit dismissing Petitioner's interlocutory appeal is dated March 13, 1997. Order, Case No. 96-7094 (Appendix A). The same Order also dismissed an interlocutory appeal by Respondent. Order, Case No. 96-7102 (Appendix A). That dismissal in Case No. 96-7102 is not included in this Petition for Writ of Certiorari.

The United States Court of Appeals' Order dismissed the appeal on the basis that it lacked jurisdiction for the interlocutory appeal from the United States District Court for the Eastern District of Oklahoma's denial of Petitioner's Motion for Summary Judgment based on the defense of qualified immunity (Appendix B).

The opinions of the Court of Appeals and the district court are unreported.

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Tenth Circuit dismissed the appeal for lack of jurisdiction over

the interlocutory appeal of the denial of qualified immunity on March 13, 1997. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari is timely filed within 90 days of March 13, 1997.

## STATUTORY AND CONSTITUTIONAL PROVISIONS

United States Code, Title 42:

§ 1983. Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit or equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

Amendment VIII Constitution of the United States:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## STATEMENT OF THE CASE

1. At the time this action arose, the decedent (Williams) was incarcerated in the Oklahoma Department of Corrections.

2. The personal representative of Williams brought this action seeking an injunction and money damages pursuant to 42 U.S.C. § 1983 for alleged violations of Williams' rights pursuant to the Eighth Amendment to the United States Constitution.

3. The gravamen of the Complaint is that the Defendants were deliberately indifferent to Williams' serious medical needs in violation of the Eighth Amendment to the United States Constitution.

4. After extensive discovery, the Defendants filed a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In the Motion, the Defendants asserted immunity from suit since, given the undisputed facts, their behavior was "objectively legally reasonable" and, therefore, they were entitled to dismissal on the basis of qualified immunity.

5. The district court denied the Defendants' Motion for Summary Judgment. In the order, the district court concluded that genuine issues of material fact exist as to the characterization of Defendants' conduct for purposes of evaluating an Eighth Amendment claim under a deliberate indifference standard. The district court found that the Defendants' subjective intent was a question of fact.

6. The Court of Appeals for the Tenth Circuit declined to accept jurisdiction of the interlocutory appeal. It characterized the Defendants' argument that their behavior

was "objectively legally reasonable" merely as an "attempt to recast what is essentially a factual question as a legal one to avoid the consequences of *Johnson v. Jones.*" (Court of Appeals slip op. at 3).

7. Williams was incarcerated at the Mack Alford Correctional Center, Stringtown, Oklahoma. The facility is a medium security facility where inmates are not locked down in their cells during the day, but rather are allowed on the yard for recreation and visitation.

8. On April 16, 1994 at approximately 3:15 a.m., Williams complained to a correctional officer of nausea, dizziness and upset stomach. Williams requested and was allowed to take a warm shower. Williams then reported that the shower had helped his condition.

9. At approximately 6:10 a.m., Defendant Standridge checked on Williams and questioned him about his condition. The nurse of the facility, Defendant McKenney, was notified and she reported to work early to examine Williams.

10. At approximately 7:30 a.m., Williams was taken to medical where he complained of a burning stomach. Williams had previously been diagnosed with a hiatal hernia and had voluntarily quit taking his ulcer medication for about two weeks prior to this date. Defendant nurse took Williams' vital signs, then administered ulcer medication. After resting approximately 15 minutes Williams reported that he was feeling better and returned to his unit. Williams was advised to return to medical if his condition worsened.

11. Defendant nurse requested that an officer check on Williams every 30 minutes and to report to her any changes in Williams' condition. This request was noted on the Unit logs and each shift was briefed on Williams' condition. Throughout the remainder of the day, correctional officers as well as other inmates checked on Williams' medical status. At no time during the day did Williams or any other inmate request further medical treatment for Williams. At no time during the day was Williams refused medical treatment.

12. Based on a shift briefing, at approximately 4:00 p.m., Defendant Nelson checked on Williams. Defendant nurse was contacted regarding Williams' condition. Although not believing Williams' condition to be an emergency, but rather believing that there was nothing more she could do for his ulcer, she advised Defendant Nelson to transport Williams to the county hospital. At approximately 7:05 p.m. Williams was transported to the hospital. At 9:25 p.m. Inmate Williams was pronounced dead.

13. At no time did the Defendant officers or the Defendant nurse believe that an emergency situation existed.

14. Other than the fact of the death of Inmate Williams, Plaintiff offered no evidence of a culpable state of mind of any Defendant, as required by *Wilson v. Seiter,* 501 U.S. 294 (1991), *Farmer v. Brennan,* 511 U.S. 825 (1994) and *Board of The County Commissioners of Bryan County, Oklahoma v. Brown,* ___ U.S. ___, 117 S.Ct. 1382 (1997).

## REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity to define what factors may be considered in a court's review of the defense of qualified immunity. The trial court's failure to find qualified immunity on behalf of the officials and the Circuit Court of Appeals' refusal to hear the interlocutory appeal based on the denial of qualified immunity deprive the petitioners of that defense. The refusal of the Tenth Circuit Court of Appeals to hear the appeal is in direct conflict with decisions of this Court in *Behrens v. Pelletier,* 516 U.S. ___, 116 S.Ct. 834 (1996) and *Johnson v. Jones,* 511 U.S. ___, 115 S.Ct. 2151 (1995).

Implicit in the Tenth Circuit Court's Order refusing to hear the appeal is the decision to eliminate the defense of qualified immunity in an action alleging cruel and unusual punishment under the Eighth Amendment. This action also is in direct conflict with decisions of this Court. Explicit in the Tenth Circuit's Order is that the factor of a "culpable state of mind" is always a fact question even when no evidence has been presented by a Plaintiff to indicate culpability by any of the Defendants. The Tenth Circuit's Order eliminates the legal standard of the initial inquiry and burden of Plaintiff to establish culpability in contradiction to the Court's decisions in *Wilson v. Seiter,* 501 U.S. 294 (1991), *Farmer v. Brennan,* 511 U.S. 825 (1994) and *Board of The County Commissioners of Bryan County, Oklahoma v. Brown,* ___ U.S. ___ 117 S.Ct. 1382 (1997).

The application of that legal standard necessarily dictates that the trial court review the facts and determine whether the Plaintiff has met that standard. Such

review does not create a "question of fact" as the Tenth Circuit has determined. Although such review has been termed a question of fact by the appeals court, the question is in reality a legal question as it addresses the legal standard for an Eighth Amendment claim and whether Defendants acted in a culpable manner.

This case is important because the Tenth Circuit's refusal to consider qualified immunity contradicts this Court's principle that civil actions against public officials under 42 U.S.C. § 1983 be disposed of as soon as practical, causing unwarranted perpetuation of litigation. The Tenth Circuit's refusal to consider qualified immunity deprives public officials of that defense.

## CONCLUSION

This Court should grant certiorari to review the Tenth Circuit Court of Appeals' decision that it lacked jurisdiction and upon review, remand with instructions to consider the appeal on the merits.

Respectfully submitted,

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**Attorney of Record*

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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|---|---|---|
| PHYLLIS A. WILLIAMS, John Mark Williams by and through Phyllis A. Williams,<br><br>Plaintiff-Appellee Cross Appellant,<br><br>v.<br><br>LINDA MCKENNEY; BILL STANDRIDGE, Capt.; THEODORE NELSON, Capt.; PHILLIP MILLER, Lt.<br><br>Defendants-Appellants Cross Appellees,<br><br>and<br><br>BOBBY BOONE; DENNIS COTNER; MARCUS POGUE,<br><br>Defendants. | ) | Nos. 96-7094 and 96-7102<br><br>D.C. No. 96-CV-144-S |

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ORDER

Filed March 13, 1997

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Before **PORFILIO, ANDERSON** and **MURPHY,** Circuit Judges

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This court lacks jurisdiction over these interlocutory appeals. *See Behrens v. Pelletier,* 116 S.Ct. 834, 842 (1996); *Johnson v. Jones,* 115 S.Ct. 2151 (1995).

The plaintiff's decedent, John Mark Williams, a state prisoner, died as a result of a heart attack. The plaintiff filed the action below under 42 U.S.C. § 1983 alleging that the defendants violated Mr. Williams' Eighth Amendment right to reasonably adequate medical care and that such deprivation resulted in Mr. Williams' death. The defendants filed a motion for summary judgment based in part on qualified immunity. The district court denied the motion as to the participant defendants, concluding that there are genuine issues of material fact. The court granted the motion as to the supervisory defendants. Both sides appeal.

In *Johnson v. Jones,* the Supreme Court held that interlocutory jurisdiction does not lie to review a denial of qualified immunity when the denial is based on the existence of a genuine issue of material fact. 115 S.Ct. at 2156, 2159. *See also Behrens v. Pelletier,* 116 S.Ct. at 842 ("*Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim, and hence there is no 'final decision.' ") (internal citations omitted).

The defendants argue that there is jurisdiction over their appeal because the issue before this court is a legal

one – that they are entitled to qualified immunity because the behavior complained of is "objectively legally reasonable." The defendants' argument is merely an attempt to recast what is essentially a factual question as a legal one to avoid the consequences of *Johnson v. Jones.*

We also determine that there is no jurisdiction over the plaintiff's appeal. No exception to the final judgment rule is applicable here. Since this court lacks jurisdiction over the defendants' appeal, there is no pendent jurisdiction over the plaintiff's appeal. *See Sevier v. City of Lawrence,* 60 F.3d 695, 701 (10th Cir. 1995).

**APPEALS DISMISSED.** The mandates shall issue forthwith.

Judge Murphy dissents from the dismissal of appeal no 96-7094 and concurs in the dismissal of appeal no. 96-7102.

Entered for the Court

PATRICK FISHER, Clerk of Court

by: /s/ Ellen Rich Reiter
Ellen Rich Reiter
Deputy Clerk/Appeals Expediter

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA**

| | | |
|---|---|---|
| JOHN MARK WILLIAMS, by and through PHYLLIS A. WILLIAMS, Plaintiff, | ) | No. 96-144-S |
| v. | ) | |
| BOBBY BOONE, et al., Defendants. | ) | |

**ORDER**

Plaintiff, Phyllis Williams, instituted this civil rights action as the personal representative of the deceased, John Mark Williams ("Williams"), who was an inmate incarcerated in the Mack Alford Correctional Center, Stringtown, Oklahoma, at the time of his death on April 16, 1994. Under the authority of 42 U.S.C. § 1983, Plaintiff seeks to recover compensatory and punitive damages, as well as declaratory and injunctive relief, for the deprivation of Williams' constitutional rights. Specifically Plaintiff alleges Defendants violated Williams' Eighth Amendment right to reasonably adequate medical care and that the deprivation of such right resulted in Williams' death.

Defendants Linda Darlene McKenney, Capt. Bill Standridge, Capt. Theodore Nelson, and Lt. Philip Miller are correctional officers employed at the Mack Alford Correctional Center and they are all sued, in their individual capacities, for monetary damages for their personal participation in the alleged Eighth Amendment

violation. McKenney is a nurse at the Mack Alford Correctional Center and Standridge, Nelson, and Miller are all shift supervisors who were on duty at some point during the times relevant to Williams' medical problems. Defendant Marcus Pogue, the Health Care Services Administrator for the Mack Alford Correctional Center, is also sued in his individual capacity, but under a theory of supervisory liability. Plaintiff also seeks declaratory and injunctive relief against Pogue, Dennis Cotner, the Health Services Director for the Oklahoma Department of Corrections, and Bobby Boone, the Warden of the Mack Alford Correctional Center.

Defendants have filed their motion for summary judgment arguing (1) Plaintiff cannot establish deliberate indifference to Williams' serious medical needs, (2) they are entitled to qualified immunity, and (3) Plaintiff lacks standing to assert claims for injunctive relief. The parties have fully briefed these issues. Having fully considered the submissions of the parties, the court concludes that genuine issues of material fact preclude the entry of summary judgment on the underlying Eighth Amendment claim against McKenney, Standridge, Nelson, and Miller. The court does conclude, however, that Pogue is entitled to qualified immunity and that summary judgment is appropriate as to Plaintiff's request for injunctive relief.

I.

The record before the court reveals the following.[1] During the early morning hours of April 16, 1994, Williams complained of nausea, dizziness, chest and stomach pains to Corrections Officer Aaron Burdex, who prepared a chair in the shower and advised Williams to sit and relax in the shower. Williams completed his shower but was still nauseous. At approximately 6:00 a.m., Williams was seen by Shift Supervisor Standridge who questioned Williams about his condition. Williams informed Standridge of his condition and also indicated that he had been experiencing vomiting and diarrhea since 8:00 p.m. the previous evening. Although Williams told Standridge that he had a hiatal hernia[2] Standridge testified in his deposition that he believed there was "a possibility" that Williams was experiencing a heart related problem. Standridge contacted Nurse McKenney at home and informed her of Williams' condition, including his complaints of nausea, diarrhea, chest and stomach pains. McKenney told Standridge that she would see Williams when she arrived at the facility for her scheduled 8:00 a.m. to 4:00 p.m. shift.[3]

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[1] Of course, when considering a defense motion for summary judgment, the court views the evidence in the light most favorable to Plaintiff. *Romero v. Board of County Com'rs*, 60 F.3d 702, 704 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 776 (1996).

[2] Williams autopsy report does not indicate the existence of a hiatal hernia.

[3] Burdex's log notes establish he checked on Williams at 6:31 a.m. and that Williams's well being at that time was "not good." This "not good" notation was included in the notes received by Plaintiff from the Attorney General's office, but was

Sometime before 8:00 a.m. on April 16, 1994, Burdex attempted to transport Williams to the medical center. Because Williams could not walk without assistance, Burdex contacted McKenney and informed her of Williams' condition. McKenney told Burdex that if he wanted her to see Williams he should get Williams over to medical because she was not coming to the unit to visit Williams. According to Burdex's report, McKenney then "hung the phone up in my face." Burdex again called McKenney and told her he was transporting Williams by wheel chair and that he, Burdex, believed Williams was "showing signs of heart failure, congested heart failure." McKenney told Burdex that Williams "don't have no heart trouble."

Williams arrived at the medial [sic] center shortly before 8:00 a.m. and was seen by McKenney. Williams complained of "burning from throat to stomach" and he was "disoriented laughing, then crying – very tense." McKenney testified she reviewed Williams' medical records which revealed a positive cardiac history. Despite

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omitted from the log notes received directly from Burdex. As argued by Plaintiff, this discrepancy raises factual disputes as to the existence of an alteration, the party responsible for the alteration, and whether an attempt was made to minimize the seriousness of Williams' condition on April 16, 1994. Also, Burdex's handwritten notes, which were allegedly sent to Plaintiff following Williams' death, indicate that Standridge "was upset on my incident report informing of my medical knowledge of [Williams'] swolen [sic] ankles, shallow breathing unable to set comfortable laying down." Again, this statement supports Plaintiff's contention that a factual dispute exists concerning any desire on the part of Standridge to suppress information about the nature and seriousness of Williams' medical condition on April 15, 1994.

these records and Williams' existing symptoms, McKenney treated Williams for a hiatal hernia and/or ulcer pains by prescribing a "green lizard", a combination of Donnatal, Maalox, and Xylocaine anesthetic. McKenney did not seek to have Williams diagnosed or treated by a qualified physician nor did she ever examine Williams again on that day.

After drinking the "green lizard", Williams experienced some temporary relief and was sent back to his cell. At 9:30 a.m. McKenney was advised that Williams was "anxious about dying in prison" and at 2:00 p.m. that he was "afraid if he went to sleep he would stop breathing."[4] A fellow inmate, Fred Smith, has also stated in his affidavit that he observed Williams during the late morning and early afternoon hours of April 16, 1994, and that Williams' skin was cool, his skin color was pale with some pink tint, he alternated between laying on his bed and sitting in his wheelchair, and that he required assistance to go from his bed to the wheelchair. Williams' condition continued to deteriorate and at 4:30 p.m., Shift Supervisor Nelson informed McKenney of Williams' deteriorating condition. Despite this information, McKenney did not examine Williams. Although McKenney testified that she instructed Nelson to send Williams to the hospital, there is some indication in the record that McKenney left the decision as to when to transport Williams up to Nelson. Nelson, who had been thoroughly briefed on Williams' condition and, moreover, had observed Williams' condition at 4:30 p.m. testified that he didn't think

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[4] Shift Supervisor Miller was on duty from 8:00 a.m. to 4:00 p.m.

Williams' condition was that serious and that he could wait until after the evening meal to transport Williams to the hospital.

Shortly after the mess hall was closed around 6:00 p.m., Williams was taken by wheelchair to the Central Control area by correctional officers and inmate Daniel Burgess. Williams awaited transportation to the Atoka Memorial Hospital. After observing that Williams was dressed in sweat pants, Nelson told the correctional officers and Burgess that Williams could not be transported to the hospital in sweat pants. Consequently, Burgess returned to Williams' cell and retrieved blue jeans for Williams to wear. Williams was lifted from his wheelchair to remove the sweat pants and put on his blue jeans. Finally, at 7:05 p.m., Williams was transported to the Atoka Memorial Hospital, where he arrived at 7:35 p.m. and was admitted to the emergency room. Williams' diagnosis was acute myocardial infarction. Williams developed cardiopulmonary arrest at 9:15 p.m. and, after intubation and unsuccessful cardiopulmonary resuscitation, was pronounced dead at 9:25 p.m.

II.

Defendants McKenney, Standridge, Nelson, and Miller argue Plaintiff has failed to establish that they were deliberately indifferent to Williams' serious medical needs and that they are entitled to qualified immunity. The court concludes that there are genuine issues of material fact existing in this case which preclude a finding that these Defendants were not deliberately indifferent to Williams' medical needs. When viewed in the

light most favorable to Plaintiff, the evidence before the court clearly presents factual disputes in connection with the determination of the nature of these Defendants' alleged actions and omissions. These disputes render this case inappropriate for summary disposition as to these Defendants. Moreover, the court finds that these same factual disputes regarding Defendants' attention to Williams' medical needs likewise preclude a finding that these Defendants are entitled to qualified immunity.

"[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This "objective reasonableness" standard for determining qualified immunity exists in order to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.* Thus, in civil rights litigation "qualified immunity protects defendants not only from liability but also from suit." *Watson v. University of Utah Medical Center*, 75 F.3d 569, 577 (10th Cir. 1996).

In assessing a qualified immunity defense, the court must first identify the constitutional right, if any, which is implicated. In the context of an inmate's Eighth Amendment claim for denial of adequate medical treatment, the standard for liability was clearly established by the Supreme Court is *Estelle v. Gamble*, 429 U.S. 97, 104-5 (1976):

> "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983 (Citations and footnotes omitted).

Under *Estelle*, Plaintiff's Eighth Amendment claim necessarily turns on whether Defendants were deliberately indifferent to Mr. Williams' serious medical needs, as opposed to merely being negligent in providing him with the necessary and timely medical attention and treatment. Absent a finding of deliberate indifference on the part of a Defendant, no violation of Mr. Williams' clearly established constitutional right exits [sic].

Because this Eighth Amendment claim involves an evaluation of a defendant's subjective intent, the qualified immunity analysis requires a defendant to make a prima facie showing of the "objective reasonableness" of the challenged conduct. *Lewis v. City of Ft. Collins*, 903 F.2d 752, 755 (10th Cir. 1990); *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d at 649. If a defendant is successful in establishing the objective reasonableness of his or her actions, the plaintiff may nonetheless avoid summary judgment "by pointing to specific evidence that the official's actions were improperly motivated." *Id.* at

649. Should the plaintiff come forward with such evidence and establish the existence of a genuine issue of fact for trial, summary judgment on the issue of qualified immunity would be inappropriate.

Defendants contend they have established the objective reasonableness of their actions and that Plaintiff has failed to come forward with specific evidence to question Defendants' motivations. The court disagrees. Viewing the evidence [sic] the light most favorable to the Plaintiff, the record establishes that beginning at approximately 3:00 a.m. on April 16, 1994, Williams exhibited acute, observable signs of cardiopulmonary complications. Notwithstanding these symptoms and each Defendants' knowledge of Williams' condition, as well as the existence of medical records indicating a positive cardiac history, Williams received no medical treatment while at the prison other than a limited examination by McKenney and the prescription of an ulcer-related medication. It wasn't until approximately 7:00 p.m. on April 16, 1994 – some 16 hours after Williams notified prison officials of his problem – that Williams was transported to a hospital for medical treatment. Given these facts, and the reasonable inferences that can be drawn from the record regarding the individual Defendants' motivations for their respective actions and omissions, the court can only conclude that genuine issues of material fact exist as to the characterization of Defendants' conduct for purposes of evaluating an Eighth Amendment claim under a deliberate indifference standard. consequently, Defendants McKenney, Standridge, Nelson, and Miller are not entitled to summary judgment on the issue of qualified immunity.

Pogue also seeks qualified immunity on Plaintiffs' supervisory liability claim against him. Plaintiff claims Pogue, the Health Care Services Administrator for the Mack Alford Correctional Center, failed to "adequately staff, train, equip, and supervise the delivery of emergency medical services at Mack Alford Correctional Center."

Individuals who act in a supervisory capacity may be held liable for constitutional violations, but " 'there is no concept of strict supervisor liability under section 1983.' " *Ruark v. Solano*, 928 F.2d 947, 950 (10th Cir. 1991) (quoting *Harris v. Greer*, 750 F.2d 617, 618 (7th Cir. 1984)). A plaintiff must do more than "show a defendant was in charge of other state actors who actually committed the violation." *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996). A plaintiff must establish "a deliberate, intentional act by the supervisor to violate constitutional rights." *Woodward v. City of Worland*, 977 F.2d 1392, 1399 (10th Cir. 1992), *cert. denied*, 509 U.S. 923 (1993) (citing *City of Canton v. Harris*, 489 U.S. 378, 389 (1989)). This standard may be satisfied by a showing that "the defendant-supervisor personally directed the violation or had actual knowledge of the violation and acquiesced in its continuance." *Jenkins*, 81 F.3d at 995.

In response to Pogue's qualified immunity submissions which establish that the Mack Alford Correctional Center's staff, equipment, and procedures have been reviewed and accredited by the American Corrections Association, Plaintiff fails to offer any evidence tending to establish deficiencies which rise to the level of deliberate indifference on the part of Pogue with respect to his supervisory responsibilities. Rather, Plaintiff makes the

conclusory statement that there are genuine issues of fact regarding whether Pogue has failed to implement a policy requiring the screening of inmates at high risk for acute heart problems for assignment to better equipped facilities or facilities with on-site cardiac care. This conclusory statement fails to support a claim for supervisory liability against Pogue. Even if believed, the mere fact that Pogue may have failed to implement such a policy does not establish that he personally directed or had knowledge and acquiesced in the continuation of any constitutional violation relative to the delivery of medical care to Williams on April 16, 1994. In sum, Plaintiff has failed to come forward with any evidence to establish a deliberate, intentional act by Pogue to violate Williams' constitutional right to reasonably adequate medical care.

III.

Finally, Pogue, Cotner, and Boone seek the entry of summary judgment on Plaintiff's claims for injunctive relief arguing that Plaintiff lacks standing to seek such relief and, alternatively, that such relief is moot as a result of Williams' death. The court agrees.

Plaintiff, the surviving spouse of a former inmate, asks the court to issue injunctive relief requiring the implementation of numerous policies and procedures with respect to the delivery of medical services to those inmates who are now, and in the future, will be incarcerated. Plaintiff, however, cannot bring claims on behalf of the inmates incarcerated in the Mack Alford Correctional Center. *See Martin v. Sargent*, 780 F.2d 1334, 1337 (8th Cir.

1985) (a prisoner lacks standing to bring claims of mistreatment of other prisoners). As the personal representative of a deceased inmate, Plaintiff has suffered no harm or personal loss; therefore, she lacks standing to assert the rights of inmates with respect to the delivery of medical care. *See Dohaish v. Tooley*, 670 F.2d 934, 936-37 (10th Cir.), *cert. denied*, 459 U.S. 826 (1982). Moreover, any claim for injunctive relief asserted by Plaintiff, on behalf of Williams, is moot as Williams is deceased.[5] *Butler v. Dowd*, 979 F.2d 661, 674 n.20 (8th Cir. 1992), *cert. denied*, 508 U.S. 930 (1993) (claims for injunctive relief by prisoners who have been released from prison are moot); *Klos v. Haskell*, 835 F.Supp. 710, 716-17 (W.D. N.Y. 1993) (injunctive relief claims relating to a specific facility are moot where inmate has been transferred from that facility). Consequently, Pogue, Cotner, and Boone are entitled to summary judgment on Plaintiff's injunctive relief claims.

IV.

Based on the foregoing, the motion for summary judgment filed on behalf of McKenney, Standridge, Nelson, and Miller is denied; the motion for summary judgment filed on behalf of Pogue is granted as he is entitled to qualified immunity on Plaintiff's supervisory liability claim; and the motion for summary judgment

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[5] Obviously, Plaintiff cannot avoid application of the mootness doctrine by establishing a substantial likelihood that the same allegedly unconstitutional practices will affect Williams in the future. *See Butler*, 979 F.2d at 674; *Klos*, 835 F.Supp. at 716-17.

filed on behalf of Pogue, Cotner, and Boone is granted with respect to Plaintiff's claims for injunctive relief.

**IT IS SO ORDERED** this 16th day of August, 1996.

/s/ Frank H. Seay
Frank H. Seay
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF OKLAHOMA**

JOHN MARK WILLIAMS, by and through PHYLLIS A. WILLIAMS,

Plaintiff,

v.

BOBBY BOONE, DENNIS COTNER, MARCUS POGUE, LINDA DARLENE MCKENNEY, CAPT. BILL STANDRIDGE, CAPT. THEODORE NELSON, and LT. PHILIP MILLER,

Defendants.

**Case No. CIV-96-144-B**

## NOTICE OF APPEAL

(Filed Aug. 28, 1996)

Notice is hereby given that Defendants Linda McKenney, Bill Standridge, Theodore Nelson and Philip Miller, hereby appeal to the United States Court of Appeals for the Tenth Circuit from an order denying Defendants' Motion for Summary Judgment based upon Qualified Immunity entered in this action on the 15th day of August, 1996.

Respectfully submitted,

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(2)

Supreme Court, U.S.
FILED
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No. 96-1963

In The

# Supreme Court of the United States

October Term, 1996

LINDA McKENNEY, et al.,

*Petitioners,*

vs.

JOHN MARK WILLIAMS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## RESPONSE TO QUESTIONS PRESENTED

1. Petitioners' characterization of the issue presented, premised upon their assertion that they "do not contest the Plaintiff's version of the facts alleging Eighth Amendment violations," is belied by the recitation of those "facts" which they do not contest in their Statement of the Case (Petition, at 3-6). The facts as characterized by the Petitioners do not represent the extensive facts presented by the Respondent and considered by the district court and the Court of Appeals in Petitioners' attempted interlocutory appeal.

2. Petitioners again interpose a false premise for the question presented, because this is hardly a case where "no evidence has been presented by Plaintiff regarding culpability" of these Petitioners (Appendix B, Petition, at 6-12).

3. Petitioners' third submission again poses a false premise to form a legal question already foreclosed by this Court's decisions and unworthy of review by writ of certiorari. Respondent has never contended that "the sole fact of the death of an inmate" establishes a culpable state of mind and, *ipso facto*, results in Eighth Amendment liability under 42 U.S.C. § 1983, and no such rule has been relied upon in any decision adverse to Petitioners in the courts below. Since this Court's decision in *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court has consistently required more than mere injury – no matter how serious – to prove an actionable violation of the Eighth Amendment. *Cf. Whitley v. Albers*, 475 U.S. 312 (1986).

4. Petitioners' final question presented is bound up in their assertion that the Court of Appeals' construction of 28 U.S.C. § 1291 and *Johnson v. Jones*, 511 U.S. ___, 115 S.Ct. 2151 (1995) denied their right to an immediate interlocutory appeal of the district court's order

## RESPONSE TO QUESTIONS PRESENTED – Continued

denying summary judgment on their defense of qualified immunity, and is the only question legitimately raised by the issues decided in the courts below. It will be addressed in the remaining section of the Brief.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Phyllis Williams, the personal representative of Plaintiff/Respondent, John Mark Williams, respectfully requests that this Honorable Court deny the petition for writ of certiorari to the Court of Appeals for the Tenth Circuit sought by Petitioners McKenney, Standridge, Nelson and Miller, for the reasons stated in this Brief in Opposition.

## OPINIONS BELOW

The opinions relevant to this Court's disposition of the instant petition are attached as Appendix A (Court of Appeals' opinion) and Appendix B (District Court opinion) to the Petition, and will be referenced as such in this Brief in Opposition.

## STATEMENT OF JURISDICTION

Respondent agrees with Petitioners that this Court has appellate jurisdiction to entertain the instant petition by virtue of 28 U.S.C. § 1254 (1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS

Although Petitioners have correctly set forth 42 U.S.C. § 1983 and the Eighth Amendment to the United States Constitution as provisions of law relevant to this action, the primary issue apparently presented by the

Petitioners is the appealability of the district court's order (Appendix B, Petition) pursuant to 28 U.S.C. § 1291, which provides, in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all **final** decisions of the district courts of the United States . . .

## COUNTER-STATEMENT OF THE CASE

Petitioners' antiseptic recitation of the facts is reminiscent of their concerted attempts to minimize the severity of John Williams' condition throughout the day that he died; unable then, as he is now, to seek a remedy on his own behalf. To be sure, the facts recited in the fourteen paragraphs of the Petition are the facts as these Petitioners would like to remember them, but they are not the facts (some of which are vigorously disputed) found by the district court to warrant the denial of qualified immunity. The United States District Court for the Eastern District of Oklahoma, denying summary judgment to these Petitioners, aptly stated:

> Defendants contend that they have established the objective reasonableness of their actions and that Plaintiff has failed to come forward with specific evidence to question Defendants' motivations. The court disagrees. Viewing the evidence in the light most favorable to Plaintiff, the record establishes that beginning at approximately 3:00 a.m. on April 16, 1994, Williams exhibited acute, observable signs of

> cardiopulmonary complications. Notwithstanding these symptoms and each Defendant's knowledge of Williams' condition, as well as the existence of medical records indicating a positive cardiac history, Williams received no medical treatment while at the prison other than a limited examination by McKenney and the prescription of an ulcer-related medication. It wasn't until approximately 7:00 p.m. on April 16, 1994 – some 16 hours after Williams notified prison officials of his problem – that Williams was transported to a hospital for medical treatment. Given these facts, and the reasonable inferences that can be drawn from the record regarding the individual Defendants' motivations for their respective actions and omissions, the court can only conclude that genuine issues of material fact exist as to the characterization of Defendants' conduct for purposes of evaluating an Eighth Amendment claim under a deliberate indifference standard.
>
> (Appendix B, Petition, at 12).

The district court's reference to the "reasonable inferences that can be drawn from the record regarding the individual Defendants' motivations for their respective actions and omissions" are worthy of some examination which is entirely lacking from Petitioners' averments to this Court The record reveals evidence of willful wrongdoing in Mr. Williams' case concerning each of these Petitioners:

- Standridge admitted that Mr. Williams' initial symptoms warned him of a "possibility" that Mr. Williams' illness was heart-related, yet he ignored these symptoms. Handwritten notes and altered log entries of

correctional officer Aaron Burdex indicate that Standridge may have subsequently pressured or intimidated Burdex concerning the contents of an incident report relating to the severity of Mr. Williams' condition. (Appendix B, Petition, at 6, fn. 4).

- McKenney refused to enter Mr. Williams' unit at Mack Alford Correctional Center to treat him, despite Mr. Williams' undisputed inability to walk to the medical unit under his own power. She dismissed Burdex's request that she check Mr. Williams on the unit when she "hung the phone up in my face." She ignored the pleas of correctional officer Burdex that Mr. Williams "was showing signs of heart failure, congested heart failure" with the curt response that Mr. Williams "don't have no heart trouble."[1] She never called, consulted, or sought a qualified diagnosis of Mr. Williams from a licensed physician. (Appendix B, Petition, at 7-8).

- Despite Mr. Williams' deteriorating condition throughout that day – which blood tests later revealed to be the result of cardiac damage which increased in lethal potential with every passing hour – each successive Shift Captain, beginning with Standridge, then Miller, and finally Nelson, ignored the signs of Mr. Williams' agony and approaching death. (Appendix B, Petition, at 8-9).

- Nelson, although thoroughly briefed on Mr. Williams' condition (Mr. Williams never walked under his own power and could hardly take food or drink from the

---

[1] As early as 9:30 a.m. that morning, inmates reported to Nurse McKenney that Williams was "anxious about dying in prison" and was "afraid if he went to sleep he would stop breathing." We know this because McKenney duly noted these events in her notes. She never returned to the unit to see Williams.

inmates who tried to assist him), waited until the conclusion of the evening meal before authorizing Mr. Williams' transport to nearby Atoka Memorial Hospital. Because he could not walk, Mr. Williams was taken by wheelchair to the Central Control Area. Nelson then delayed Mr. Williams' transport (in a state corrections van with no medical or emergency staff, and no oxygen tank) while he dispatched another inmate to return to the unit and retrieve blue jeans for Mr. Williams to wear. Nelson apparently felt that Mr. Williams could not be transported in the sweat pants he had worn all day as he lay dying. Nelson looked on as Mr. Williams had to be lifted from the wheelchair to remove the sweat pants and put on the blue jeans. (Appendix B, Petition, at 8-9).

- When Mr. Williams' custodians delivered him to the care of physicians at Atoka Memorial Hospital at 7:35 p.m., he was promptly diagnosed with acute myocardial infarction – a massive heart attack. Despite their belated efforts to save him, his heart stopped at 9:15 p.m. He was pronounced dead at 9:25 p.m. (Appendix B, Petition, at 9).

## REASONS FOR DENYING THE PETITION

### The Court of Appeals Properly Applied *Johnson v. Jones* And Dismissed Petitioners' Interlocutory Appeal

In the decision from which Petitioners now seek certiorari, the Court of Appeals correctly followed the rule set down by this Court in *Johnson v. Jones*, 511 U.S. ___, 115 S.Ct. 2151 (1995). The question of the Court of Appeals' jurisdiction to review the district court's denial of summary judgment under 28 U.S.C. § 1291 was posed by the Court of Appeals and fully briefed by the parties.

The Court of Appeals cited this Court's subsequent statement that "*Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim, and hence there is no final decision." Appendix A, Petition, at 2, *citing, Behrens v. Pelletier,* 116 S.Ct. 834, 842 (1996).

Stripped of the extravagant claim that the unpublished Court of Appeals' order here under consideration represents a "decision to eliminate the defense of qualified immunity in an action alleging cruel and unusual punishment under the Eighth Amendment," Petitioners argument here seeks to "legalize" an essentially factual question of the state actors' subjective intent; and thereby to obtain immediate review in the Court of Appeals of every district court order which refuses to swallow whole a civil rights defendant's view of which facts are relevant to a determination of liability. Even if this Court were inclined to adopt the expansive view of § 1291 urged by these Petitioners, there is no basis on the record before this Court to conclude that the outcome would have been different.

The Petitioners fundamentally disagree with the district court's refusal to accept their version of the "undisputed facts" (a version substantially identical to the sanitized fourteen paragraphs found in the Petition) and move on to a conclusion that their actions were "objectively legally reasonable." The district court considered

the evidence under the appropriate standard in the posture of a request for summary-judgment – in the light most favorable to the Plaintiff – and simply concluded:

> Given these facts, and the reasonable inferences that can be drawn from the record regarding the individual Defendants' motivations for their respective actions and omissions, the court can only conclude that *genuine issues of material fact exist* as to the characterization of Defendants' conduct *for purposes of evaluating an Eight Amendment claim under a deliberate indifference standard.*

We take this to mean a very simple thing: That the facts presented by Plaintiff/Respondent were sufficient to submit the question of Petitioners' deliberate indifference to a serious medical need to a properly instructed jury. Petitioners do not make the claim that a jury is incompetent to make this determination: They are typically the prevailing parties in such cases. Nor can they make the claim that their motion for summary judgment requires the district court to take that question from the jury in every case before a single witness is sworn, so that they might immediately appeal that determination to the nearest Court of Appeals.

To grant the relief requested by Petitioners would require the Court of Appeals to face the very problems which led this Court to its unanimous decision in *Johnson v. Jones*, 511 U.S. ___, 115 S.Ct. 2151 (1995): The inconvenience and costs of piecemeal review, the danger of denying justice by delay, the comparative expertise of trial and appellate courts, and the wise use of appellate resources counsel against it. This Court held in *Mitchell v. Forsyth*,

472 U.S. 511 (1985) that "a district court's claim of qualified immunity, to the extent that it turns on *an issue of law*, is an appealable 'final decision' within the meaning of 28 U.S.C. 1291." Id. at 526. (emphasis added). Moreover, the Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) defined "objective legal reasonableness" as official conduct which "does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known." Id. at 818. Petitioners have never contested Respondents' claim that deliberate indifference to a serious medical need violates "clearly established" rights guaranteed by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97 (1976).

Petitioners cannot bring this case within the parameters of the order held immediately appealable in *Behrens v. Pelletier*, 516 U.S. ___, 116 S.Ct. 834 (1996), because the district court's order did not "necessarily" determine that certain conduct attributed to Petitioners constituted a violation of clearly established law. The district court's order simply identified, quite clearly, those genuine disputes of material fact which might permit a properly instructed jury to find that Petitioners acted with deliberate indifference to Respondents' serious medical need. This was the extent of the court's duty under the Petitioners' motion for summary judgment. Nor was this a case, such as that anticipated in *Johnson v. Jones*, where "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." 115 S.Ct. at 2159.

The Court of Appeals correctly perceived the Petitioners' invocation of "objective legal reasonableness" as

"merely an attempt to recast what is essentially a factual question as a legal one to avoid the consequences of *Johnson v. Jones*. Appendix A, Petition, at 3. This Court should reject Petitioners' further efforts to convert the shield of qualified immunity into the sword of expense and delay.

## CONCLUSION

This Court should deny the writ of certiorari, and the petition therefore should be dismissed.

Respectfully submitted,

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